

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

In re: : **CIVIL ACTION**
: **SUSAN MAE BOATES** : **No. 05-4353**

MEMORANDUM AND ORDER

Schiller, J.

January 23, 2006

Susan Mae Boates appeals a final bankruptcy court decision that validated a foreclosure sale of her house by retroactively terminating the automatic bankruptcy stay. For the reasons set forth below, the Court affirms the decision of the Bankruptcy Court.

I. BACKGROUND¹

Appellee Gilpin, Van Trump & Montgomery, Inc. (“Gilpin”) held the first mortgage on a house owned by Appellant Boates and her husband. On December 18, 2003, the Boates filed a joint voluntary Chapter 13 bankruptcy petition to prevent foreclosure on their house. On October 25, 2004, Gilpin filed for termination of the automatic stay, alleging that the Boates were delinquent in their post-bankruptcy mortgage payments. Also, the Chapter 13 trustee sought to dismiss the Boates’ bankruptcy case, claiming they failed to file a viable plan and were delinquent in plan payments. On November 5, 2004, the Boates requested voluntary dismissal of their Chapter 13 case, and the case was dismissed on November 9, 2004. Pursuant to 11 U.S.C. § 109(g)(2), the Boates’ voluntary dismissal barred them from filing another bankruptcy petition within 180 days, until May 9, 2005.

With a mortgage foreclosure judgment in hand, Gilpin scheduled a sheriff’s sale of the Boates’ house for March 18, 2005. On March 17, 2005, the Boates filed an emergency petition in

¹ The Bankruptcy Court found the facts as set forth here. *See In re: Boates*, No. 05-17077F (Bankr. E.D. Pa. July 6, 2005).

state court seeking to postpone the sale until May 20, 2005. In their petition, the Boates represented that the postponement would allow them to sell a timeshare interest, to liquidate a retirement account and to refinance their real property in order to satisfy their mortgage default to Gilpin. The state court postponed the foreclosure sale until April 15, 2005, on which date another hearing was held to determine whether an additional postponement was warranted.

At the April 15th hearing, the state court postponed the foreclosure sale until May 20, 2005. The state court expressed concern that the sheriff's sale was rescheduled for a date after the bar lifted on the Boates' ability to refile for bankruptcy. Accordingly, the state court's postponement order was based upon the Boates agreeing to: (1) extend the bar on their refiling for bankruptcy by thirty days; and (2) not to seek any additional postponements of the sale. The order explicitly stated the Boates agreed to these two conditions. Nevertheless, Susan Mae Boates refiled for bankruptcy on May 18, 2005. Despite knowledge of Boates' refiling, Gilpin gave the foreclosure sale order to the Sheriff, who held the auction sale on May 20, 2005. On May 23, 2005, Gilpin moved the Bankruptcy Court to validate the sale of Boates' house by retroactively annulling the stay that had gone into effect upon Boates' refiling for bankruptcy. The Bankruptcy Court granted Gilpin's motion on July 6, 2005, and this Court presently reviews that decision.

II. STANDARD OF REVIEW

District courts have jurisdiction over appeals from final bankruptcy court judgments and orders. 28 U.S.C. § 158(a) (2005). A district court reviewing a bankruptcy court's decision has plenary review over the bankruptcy court's legal conclusions. *See Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999); *Computer Personalities Sys. v. Aspect*

Computer, 320 B.R. 812, 816 (E.D. Pa. 2005). A district court must accept a bankruptcy court's findings of fact unless they are "clearly erroneous." FED. R. BANKR. P. 8013 (2005) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.").

III. DISCUSSION

In this appeal, Boates claims the Bankruptcy Court was incorrect in retroactively annulling the bankruptcy stay in favor of Gilpin because: (1) Gilpin did not meet its burden of proving the elements of judicial estoppel and equitable estoppel; and (2) Boates agreement not to refile for bankruptcy within a certain time frame was invalid and without consequence. (Br. of Appellant at 2.) Before addressing these claims, the Court first considers the standards for annulling an automatic bankruptcy stay.

A. Annuling the Automatic Stay for a Filing in Bad Faith

Filing a bankruptcy petition triggers an automatic stay on the "enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case." 11 U.S.C. § 362(a)(2) (2005). However, a bankruptcy court has the authority to annul an automatic stay, even with respect to a violation of the stay that has already occurred. 11 U.S.C. § 362(d)(1); *see also In re: Siciliano*, 13 F.3d 748, 751 (3d Cir. 1994) ("[I]nclusion of the word 'annulling' in the statute, indicates a legislative intent to apply certain types of relief retroactively and validate proceedings that would otherwise be void *ab initio*."). The decision to annul an automatic stay is entrusted to the discretion of the bankruptcy court. *See In re: Brown*, 311 B.R. 409, 412 (E.D. Pa. 2004); *In re: Shariyf*, 68 B.R. 604, 606 (E.D. Pa. 1986). A court "abuses its discretion

when its ruling is founded on an error of law or a misapplication of law to the facts.” *In re: O’Brien*, 188 F.3d 116, 125 (3d Cir. 1999). The burden for showing an abuse of discretion is heavy; abuse is found “only where no reasonable man would take the view adopted by the [lower] court.” *See Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir. 1976) (quoting *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942)).

A court may grant relief from an automatic stay if a bankruptcy filing is made in bad faith. *See* 11 U.S.C. § 362(d)(1) (court shall grant relief for cause); *In re: Dulisse*, Civ. A. No. 01-1385, 2001 U.S. Dist. LEXIS 9307, at *6 (E.D. Pa. July 5, 2001); *In re: Lippolis*, 228 B.R. 106, 111 (E.D. Pa. 1998). Bad faith is determined in a case by case manner. *See In re: Lilley*, 91 F.3d 491, 496 (3d Cir. 1996). Factors relevant to that determination include: (1) the nature of the debt; (2) the timing of the petition; (3) how the debt arose; (4) the debtor’s motive in filing; (5) how the debtor’s actions affected creditors; (6) the debtor’s treatment of creditors before and after filing; and (7) whether the debtor has been forthcoming with the bankruptcy court and creditors. *Id.* (quoting *In re: Love*, 957 F.2d 1350, 1357 (7th Cir. 1992)).

Here, the Bankruptcy Court found that given the totality of circumstances Boates filed her second bankruptcy petition in bad faith. *In re: Boates*, No. 05-17077F, slip op. at 11 (Bankr. E.D. Pa. July 6, 2005). The Bankruptcy Court based its finding of bad faith on false representations Boates made to the state court and to Gilpin. *Id.* at 17-18. Specifically, Boates falsely represented that: (1) both postponements of the foreclosure sale were sought to enable her to organize funds to repay Gilpin; and (2) the May 20th foreclosure sale date was firm. *Id.* at 3, 17-18. The Bankruptcy Court found that: (1) a foreclosure sale on the Boates’ house would have occurred on April 15, 2005 but for the Boates’ agreement to extend the bar on their bankruptcy filing; and (2) Boates refiled for

bankruptcy on May 18, 2005 with the intention of defeating the foreclosure sale. *Id.* at 18, 21. The Bankruptcy Court found bad faith based upon the motive and timing of Boates' refiling, the negative impact Boates' treatment had on Gilpin, and Boates' failure to be forthcoming with Gilpin. The Bankruptcy Court's finding of bad faith is a sufficient ground upon which to grant Gilpin relief from the automatic stay. *See In re: Myers*, Civ. A. No. 04-5282, 2005 U.S. Dist. LEXIS 23837, at *26 (E.D. Pa. Oct. 18, 2005) ("[A] debtor's filing of a Chapter 13 petition in bad faith is grounds for granting a creditor relief from the automatic stay."); *see also In re: Lippolis*, 228 B.R. at 112 ("Filing a bankruptcy petition in 'bad faith' is sufficient cause for relief from the automatic stay pursuant to section 362(d)(1).").

B. Judicial and Equitable Estoppel

Although its finding of bad faith is a sufficient basis to annul the automatic stay, the Bankruptcy Court concluded that equitable and judicial estoppel also prevent Boates from claiming the stay's protection with respect to the foreclosure sale. *In re: Boates*, No. 05-17077F, slip op. at 11, 21. Boates contends that Gilpin failed to meet its burden of proof on these issues because Gilpin did not explicitly argue them before the Bankruptcy Court. (Br. of Appellant at 2-4.) Judicial estoppel applies when a party asserts a position in one court proceeding and then in bad faith asserts an inconsistent position in another proceeding. *See Montrose Med. Group Participating Sav. Plan v. Bulger*, 243 F.3d 773, 777-78, 782 (3d Cir. 2001). A trial court may raise the issue of judicial estoppel *sua sponte*, as the Bankruptcy Court did below. *See Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 121-22 (3d Cir. 1992); *In re: Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) ("The doctrine of [judicial] estoppel is intended to protect the courts rather than the litigants, so it follows that a court . . . may raise the estoppel on its own motion in an appropriate case."). Therefore, Gilpin need

not have raised judicial estoppel for the Bankruptcy Court to consider the issue. Because judicial estoppel was raised *sua sponte*, Boates should have had an opportunity to argue against its application. See *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314, 325 (3d Cir. 2003); *Montrose*, 243 F.3d at 780 n.5.

Judicial estoppel is a remedy that should be used sparingly, only in egregious cases of misrepresentation. See *Krystal Cadillac-Oldsmobile GMC Truck*, 337 F.3d at 324. Judicial estoppel is appropriately applied only if no sanction established by a relevant statute or the Federal Rules of Civil Procedure can adequately remedy the damage done by a litigant's misconduct. See *Montrose*, 243 F.3d at 784-85 (“[B]efore utilizing its inherent powers, a district court should consider whether any Rule- or statute-based sanctions are up to the task [of remedying the damage done.]”) (*citing Klein v. Stahl GMBH & Co. Maschinefabrik*, 185 F.3d 98, 108, 110 (3d Cir. 1999)). In this case, 11 U.S.C. § 362(d)(1) allows the Bankruptcy Court to fully remedy the harm brought by Boates' bad faith and misrepresentations. Therefore, the Bankruptcy Court should not have invoked judicial estoppel and more appropriately granted Gilpin relief under the Bankruptcy Code.

Equitable estoppel applies when one party rightfully relies on a representation of fact by another party, who is estopped from later denying that representation because the relying party would be injured. See *In re: RFE Indus., Inc.*, 283 F.3d 159, 164 (3d Cir. 2002) (*quoting Wheeling-Pittsburgh Steel Corp. v. McCune*, 836 F.2d 153, 162-63 (3d Cir. 1987)). In order for a court to consider equitable estoppel, a party must affirmatively plead such a claim to give the opposing party an opportunity to conduct discovery and respond. See FED. R. CIV. P. 8(c) (2005) (“[A] party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense.”); *ADC Telecomms., Inc. v. Siecor Corp.*, 954 F. Supp. 820, 825 (D. Del. 1997) (discussing

court's consideration of equitable estoppel claim as problematic if defendant failed to plead equitable estoppel and opposing party did not otherwise have knowledge of estoppel defense). Here, neither party raised equitable estoppel, and it was therefore not properly before the court. However, because this Court upholds the Bankruptcy Court's determination that Boates' second bankruptcy petition was filed in bad faith, the Bankruptcy Court's invocation of equitable estoppel is non-dispositive.

C. Extension of Bar on Bankruptcy Refiling

Boates argues that the state court order extending the bar on the Boates refiling for bankruptcy amounted to an invalid waiver of bankruptcy benefits. (Br. of Appellant at 5-7.) Boates asserts that the order, therefore, did not impose any obligations or restraints on her. *Id.* Generally, a debtor cannot validly contract with a creditor and agree not to file for bankruptcy in the future. *See Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966); *In re: Weitzen*, 3 F. Supp. 698, 698-99 (S.D.N.Y. 1933); *In re: Madison*, 184 B.R. 686, 690-91 (Bankr. E.D. Pa. 1995). The Bankruptcy Court stressed that it did not decide that Boates was ineligible for bankruptcy relief on May 18, 2005 based on the state court order. *In re: Boates*, No. 05-17077F, slip op. at 11. Rather, the Bankruptcy Court assumed that Boates was eligible for bankruptcy relief but found that she filed in bad faith. *Id.*

Boates claims that *In re: Avalon Hotel Partners, LLC*, 302 B.R. 377 (Bankr. D. Or. 2003), supports her position that the Bankruptcy Court should not have considered Boates' agreement to extend the bar on her refiling. (Br. of Appellant at 10.) Boates' claim is without foundation. Although the *Avalon* court declined to apply judicial estoppel to enforce the debtor's representation to a state court that it would not file for bankruptcy prior to a certain time, that court did consider the debtor's representation as part of its bad faith analysis. *Avalon*, 302 B.R. at 383-84. In *Avalon*, a limited liability corporation filed a voluntary Chapter 11 petition. *Id.* at 379. The debtor corporation

and one of its interest holders were involved in state court litigation, which led to an auction sale of the debtor's hotel with the interest holder as the highest bidder. *Id.* at 380-81. The state court extended the closing of the auction sale because the manager of the debtor corporation provided assurances that the debtor would not file for bankruptcy prior to the extended closing time. *Id.* at 382-83. When the debtor filed for bankruptcy two hours before the auction sale closed, the interest holder sought dismissal on judicial estoppel and bad faith grounds. *Id.* at 380, 383.

The *Avalon* court did not apply judicial estoppel to dismiss the debtor's case, reasoning that would be equivalent to enforcing a covenant not to file for bankruptcy. *Id.* at 383. The court also noted that interest holders who were not parties in the state court litigation would be adversely affected by the application of judicial estoppel. *Id.* The *Avalon* court judged that the debtor's misconduct in the state court litigation was appropriately addressed under the Bankruptcy Code as a basis for granting a motion to dismiss for cause due to bad faith. *Id.* Likewise, the Bankruptcy Court considered Boates' misconduct in the state court litigation as a basis for granting annulment of the automatic stay for cause due to bad faith.

Additionally, the Bankruptcy Court distinguished Boates' situation from *Avalon* in three important ways. First, it noted Boates' situation was limited to two parties, without innocent third party creditors and interest holders who could be negatively impacted. *In re: Boates*, No. 05-17077F, slip op. at 21. Second, the Bankruptcy Court emphasized the difference between waiving the right to file for bankruptcy and extending an existing bar against future filings. *Id.* at 19-21. At the time it promised the state court that it would not file for bankruptcy within a certain time frame, the *Avalon* debtor was free to immediately file for bankruptcy. *Id.* at 20. In contrast, Boates was already barred from filing for bankruptcy when she represented she would extend that bar. *Id.*

Absent this representation by Boates, foreclosure would have occurred without an extension and without Gilpin providing her another opportunity to satisfy her mortgage default. *Id.* Third, the Bankruptcy Court contrasted Boates' motive of saving her house for her own benefit with the effect of the bankruptcy petition in *Avalon* of maximizing the sale value of the debtor's assets for the benefit of a host of creditors. *Id.* at 20-21. Most importantly, the Bankruptcy Court's bad faith analysis properly considered Boates' misrepresentations as they related to the motive and timing of her refiling and her mistreatment of Gilpin.

IV. CONCLUSION

The Bankruptcy Court did not abuse its discretion in relieving Gilpin of the automatic stay. Therefore, the Court affirms the Bankruptcy Court's order. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

In re: : **CIVIL ACTION**
: **SUSAN MAE BOATES** : **No. 05-4353**

ORDER

AND NOW, this **23rd** day of **January, 2006**, upon consideration of the Brief of Appellant Boates, the Brief of Appellee Gilpin, Van Trump & Montgomery, Inc., the Reply Brief of Appellant Boates, and for the foregoing reasons, it is hereby **ORDERED** that:

1. The judgment of the Bankruptcy Court is **AFFIRMED**, and the appeal is **DENIED**.
2. The Clerk of Court is directed to close this case.

BY THE COURT:

A handwritten signature in blue ink, appearing to read 'Berle M. Schiller', with a long horizontal flourish extending to the right.

Berle M. Schiller, J.